UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

LENOX HILL HOSPITAL, Employer, and THE NEW YORK PROFESSIONAL NURSES UNION, Charging Party.	Case No. 02-CA-103901

LENOX HILL HOSPITAL'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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STATEMENT OF THE CASE[1]

Lenox Hill Hospital ("Lenox Hill" or "the Hospital"), by and through its attorneys McCarter & English, LLP, submits this brief in support of its exceptions to the October 1, 2014, decision of Administrative Law Judge Mindy E. Landow ("ALJ"). The Complaint alleges, *inter alia*, that Lenox Hill violated Sections 8(a)(1) and 8(a)(5) of the Act by failing and refusing to provide the New York Professional Nurses Union ("NYPNU" or "the Union") with allegedly relevant information. (Ex. 1(c)). The hearing in this matter was held before the ALJ on May 6, 2014. The ALJ issued her decision on October 1, 2014. The primary issue raised by Lenox Hill's exceptions is whether the ALJ erred in determining that the Hospital must provide information to the Union about nonunit nurses' aides. The information on nonunit employees is presumptively not relevant.

Beyond that, the ALJ erred by failing to enforce the agreed-upon procedure for resolving disputes arising under Article XXVI of the collective bargaining agreement ("CBA"), under which this dispute arose. The narrowly tailored procedure of that Article both sets forth the manner to raise Article XXVI grievances over nurse to patient staffing ratios and limits the information to be provided in connection with such a grievance. Through collective bargaining, the Union unmistakably waived its right to additional information in connection with this type of grievance. Therefore, regardless of whether the information sought was relevant, Lenox Hill was not under an obligation to produce it. Since the Union's information requests clearly were in furtherance of Article XXVI grievances, the ALJ erred in not applying the CBA-mandated procedure to limit the type of information required to be produced.

[1] References to the transcript of the May 6, 2014, hearing held before Administrative Law Judge Mindy E. Landow will be referred to by page and line as "Tr. ___, ___." References to ALJ Landow's decision will be referred to as "Dec. ___." References to Exhibits introduced at the hearing by the General Counsel will be referred to as "Ex. ___."

Next, as for the information concerning bargaining unit employees, much of that is also subsumed by the grievance procedure set forth in Article XXVI. Yet, regardless of whether it was under an obligation to do so, the Hospital complied with requests for bargaining unit staffing information in good faith. Finally, the ALJ erred in finding that the Hospital's inadvertent production delays violated the Act. The Hospital believed that it had fulfilled those requests. If the Union did not believe that the information provided was responsive it should so have advised the Hospital. This it failed to do.

STATEMENT OF FACTS

A. The Parties

Lenox Hill is a Hospital located in New York City. Jurisdiction is admitted and was found by the ALJ. Emily Weisenbach ("Weisenbach") and Kiera Stajk ("Stajk") are each employed as Directors of Talent and Organizational Performance in the Hospital's Human Resources Department. (Dec. 2)

Since 1985, the Union has represented a unit consisting primarily of registered nurses. (Dec. 2). Eileen Toback ("Toback") is the Union's Executive Director. Maureen McCarthy ("McCarthy") is its President. Nisha Banerjee ("Banerjee") was the Union's Associate Director until December 2013. (Dec. 2).

The Union's information requests sought information concerning nonunit nurses' aides. Nurses' aides are members of other bargaining units at the Hospital, the largest of which is represented by 1199 SEIU. (Tr. 119, 96).

B. The CBA

Lenox Hill and the Union are parties to a CBA that covers the period from November 1, 2012 to October 31, 2015. (Ex. 3). As is typical, the CBA covers the terms and conditions of employment for the bargaining unit of registered nurses, including seniority, hours of work,

vacations, sick leave, and benefit plans. (Id.) The underlying grievance, and by extension the information requests at issue, all arose under Article XXVI. That provision, titled "Nurse/Patient Ratios," sets forth nurse to patient staffing ratios for each unit at the Hospital. (Ex. 3 at 81-87; Tr. 13). Section 7(a) of Article XXVI lays out the specific ratios for each unit. For example, all Medical Surgical In-Patient Units, with the exception of Psychiatric Patient Units, have a "1:6" ratio, which means that one nurse is on duty for each six patients. (Ex. 3 at 84; Tr. 13).

In addition to setting forth the nurse to patient ratios for each unit, Article XXVI provides a procedure for determining whether the Hospital has met those staffing standards. Specifically, the parties are to meet on a quarterly basis to review actual staffing compared to required staffing based on the average daily census. (Ex. 3, Art. XXVI, Sec. 2). If the Union alleges at the quarterly review that staffing standards are not being adhered to, it may bring the dispute before a "qualified individual" for mediation. If not settled in mediation, either party then may take the dispute to arbitration. However, the arbitrator's authority is limited to resolving whether the Hospital "has failed, without justification, to adhere to the staffing standards." Moreover, the sole remedy the arbitrator is empowered to award is a direction to the Hospital to "enter into substantial compliance with the staffing standards." (Ex. 3, Art. XXVI, Sec. 6).

Moreover, the parties agreed to limit the information that must be produced in connection with verifying Article XXVI compliance. Specifically, the Hospital is required to provide to the Union, and the parties will review on a quarterly basis, "actual staffing compared to required staffing (to meet nurse-to-patient ratios) based on the average daily census." (Ex. 3, Art. XXVI, Sec. 2). This limitation acknowledges that, when boiled down to their core, the staffing ratios are nothing more than numbers: whether the Hospital has complied with the staffing ratios can

be determined by reviewing the single document that the parties agreed should be used for such a review.

The General Counsel did not introduce any evidence that the Union complied with this procedure. There is no evidence that the Union sought staffing data on a quarterly basis, sought to review this information with the Hospital, or sought mediation prior to arbitrating any dispute. Nor did the ALJ give the Article XXVI procedure any weight, even though she cited in full Sections 1, 2, 3, and 6 in her decision. (Dec. 2-3).

C. <u>The CBA's Negotiations</u>

In Article XXVI, the Hospital agreed to provide "*qualified* support personnel" without reference to numbers or ratios. (Ex. 3 at 81) (emphasis added). This aspirational language was added to the CBA during the parties' most recent negotiations in 2012. (Tr. 12).

Weisenbach explained that during those negotiations the parties discussed at length support personnel staffing, an issue prompted by a prior arbitration on the subject. (Tr. 97-98). The Union made proposals to *quantify the requisite numbers* of ancillary staff, demanding language such as "sufficient" or "adequate" be added to the provision dealing with nonunit personnel. (Tr. 98). Yet, this did not happen because, as Weisenbach explained:

> Q Do you understand how that particular provision came into the agreement?
>
> A Yes.
>
> Q Tell us.
>
> A There was lengthy discussion that came out of a different arbitration regarding ancillary staffing and the union's desire to have us more clearly define what kind of support personnel needed to be on the units.
>
> Q Did that include quantity of staff, as well as quality of staff?

A I obviously don't remember the exact words that were used; but, yes, there was a discussion that they wanted sufficient or adequate involved. And we vehemently opposed that suggestion.

Q And why did you oppose that?

A For a myriad of reasons, not the least of which is they don't represent that group of employees, so it didn't seem appropriate. Nor did it seem relevant to the nurse to patient ratios in the article that we were discussing.

(Tr. 97, 20-25; Tr. 98, 1-12).

The Union's witnesses, on the other hand, were evasive about what transpired in negotiations. McCarthy, who acknowledged that she had participated in the negotiations, professed not to recall how the CBA's current language was added, "what the proposal was in the beginning, nor through the process." (Tr. 90, 12-13). She did not remember the debate about it, only that they "wanted nursing attendants." (Tr. 90, 4-16). Toback, who also participated, admitted that the Union was seeking through its proposal to obtain *sufficient* support staff, as the Union was concerned that there were not enough aides. (Tr. 70, 19-21; Tr. 71, 1-2). However, consistent with Weisenbach's testimony, Toback conceded that the resulting CBA language is limited to support staff "qualifications." (Tr. 71, 21-25; Tr. 72, 1-10; Tr. 73, 1-11).

Ultimately, the parties settled upon the CBA's current language, which speaks only of *qualified* ancillary staff. Neither Union witness contradicted the Hospital's version of how and why Article XXVI became modified. Clearly, the Union attempted to obtain commitment to nonunit employee staffing levels in the CBA, but the Hospital rejected those requests. Had the Union's bargaining proposals become part of the CBA, the Hospital would have been required to provide information to verify nonunit staffing. In view of the Hospital's rejection of the Union's bargaining table proposals, the Board should not permit the Union to obtain what it could not in negotiations.

D. The Union's Grievance

On February 12, 2013, the Union, through its Associate Director Nisha Banerjee ("Banerjee"), filed its Grievance alleging a violation of CBA Article XXVI. (Ex. 5; Tr. 13, 18-22). The Grievance complained that the Hospital did not comply with the agreed-upon nurse to patient staffing ratios on several units. The primary purpose of the Grievance was to address concerns about proper nurse to patient ratios. (Tr. 52, 9-16). The Union did not raise its Grievance at a quarterly review of staffing levels, as required by Article XXVI. All of the Union's information demands were made pursuant to the Grievance, which is still pending. (Tr. 50, 12-14, 23-25; Tr. 51, 1-6).

E. The Union's Information Requests

The Complaint alleges that the Hospital did not provide certain information in response to three letters dated February 22, February 27, and April 12, 2013. (Ex. 1(c) at ¶8). Banerjee provided all three letters to the Hospital in connection with the Grievance.

The Union's first letter sought three types of information. However, the Complaint only alleges a refusal to respond to two of those requests. (Ex. 1(b) at ¶ 8(a)). Both requests sought information related to the Hospital's use of aides for one-to-one assignments, by either its own aides or those provided by Access, a vendor staffing provider. The Union wanted to know: 1) the number of hours worked by aides in one-one-one assignments for the past six months, and 2) the number of hours that Access provided aides for one-to-one assignments for the last twelve months. (Ex. 8).[2]

[2] The ALJ correctly found that the Hospital's failure to provide information regarding workers provided by contractor Access did not violate the Act. Access had not supplied workers to the Hospital since 2010 and, as the ALJ found, information regarding such contracting is not relevant to the assessment of a 2013 grievance. (Dec. at 13).

Then on February 27, 2013, the Union made a five part information request: 1) patient census reports from September 1, 2012 to February 22, 2013; 2) FTE full complement standard (filled and unfilled positions) for each unit named in the grievance, including ancillary staff; 3) overtime hours and shifts worked by nurses' aides between September 2012 and February 22, 2013; 4) mean and mode of hours between when patients received their discharge orders and left the Hospital; and 5) the number of times that nurse aides were pulled off units to cover one-to-one assignments. (Ex. 10; Tr. 22).

On February 28, 2013, Banerjee emailed Weisenbach to ask about the status of the requests. Weisenbach immediately replied that she was working on it, but was unsure of the extent to which the Hospital could comply. (Ex. 11).

In late February 2013, Weisenbach and Banerjee spoke about the status of the requests. Weisenbach advised that the Hospital did not have information responsive to some of them, and some of the information sought did not appear to be relevant.

The information requests about nurse's aides were discussed at meetings between the parties on March 5 and 14, 2014. (Tr. 102, 20-23; Tr. 103, 8-15). Yet because Banerjee could not explain why the Union needed the nonunit employee information, the Hospital held to its position that the information would not be produced. (Tr. 103, 1-5). The record in this case contains no evidence that anyone has ever explained at the Hospital's request the information's relevance to the Union's duty of representation, except vaguely to contend that aides were pulled away from doing other aide functions. (Tr. 103, 8-12). A clear answer to the Hospital's question, of critical importance in this case, was never provided. (Tr. 108, 22-25; Tr. 109, 1-9).

On March 5, 2013, the parties met to discuss the Grievance. Attending the meeting on behalf of the Union were Banerjee, McCarthy, Toback, and Vice President Kathy Flynn, among

others. (Tr. 25). Attending on behalf of the Hospital were Weisenbach, HR Manager Kiera Stajk, and Nursing VP Phyllis Yezzo, among others. (Tr. 25). At the meeting, the Hospital provided the Union with staffing information responsive to the first request made on February 27, 2013. (Ex. 12-13). The data provided by Weisenbach covered the period of January 1 to February 19, 2013. The Union's request had also sought data from September 1 to December 31. (Tr. 26; Exs. 12-13). Weisenbach did not realize at the time that she had provided an incomplete response to the request. (Tr. 100). The Union never brought to the Hospital's attention the fact that the information provided was only partially responsive. Although under no duty to do so outside of the quarterly review process, the Hospital would have provided the missing information had the inadvertent omission been brought to its attention. (Tr. 100, 2-4, 14-24).[3]

During the March 5 meeting, the parties discussed the Union's information requests. Aside from suggesting that an increase in one-to-one cases had pulled some aides away from doing some of their functions, the Union did not otherwise justify its requests for nonunit statistical information. (Tr. 103, 8-15).

Weisenbach explained that while the Hospital did not intend to provide ancillary staff data, it would provide the requested FTE full complement standard for bargaining unit employees. (Tr. 106, 12-16). The Hospital regularly provides a full nurse staffing list whenever requested. (Tr. 106, 18-24; Ex. 3 at 10). The Union never followed up with a further request for the unit employee data.

At the meeting the parties also discussed the request for "mean and mode of hours" in connection with discharges from the Hospital. The Union explained that it wanted to understand

[3] Clearly, the *type* of information that the Hospital provided was sufficient. The Complaint only alleges a failure to provide staffing information from "September 1, 2012 to December 31, 2012," thus demonstrating the adequacy of the information provided for the later time period. (Ex. 1(c) at ¶ 8(b)).

how long a patient could linger on a unit after discharge. Weisenbach responded that she did not have that type of data. (Tr. 107, 13-24; Tr. 104, 8-16). Since some discharge orders are written far in advance of the actual discharge as a matter of course, the requested information would not have been ascertainable without analysis of every patient's chart from that day. (Tr. 104, 17-23). Furthermore, since the Hospital does not have an electronic medical records system, it could not track the time between patient discharge and departure. (Tr. 116, 8-17, 23-25; Tr. 1-6). Weisenbach left the meeting believing that she did not need to provide any additional information in response to this request, as the Union appeared satisfied with her explanation. (Tr. 108, 22-24; Tr. 118, 16-18). The veracity of this belief was never challenged.

Although the Hospital questioned the appropriateness of the Union's request for the number of times that nurses' aides were pulled off units for one-on-one assignments, the Union did not respond with any explanation for why it needed the requested data. As with the other requests for nonunit information, the Hospital considered the information irrelevant to the Union's right to police Article XXVI, a belief the Union did nothing to dispel. (Tr. 108-09).

The parties had a brief follow-up meeting on March 14, 2013. Weisenbach and Stajk attended on behalf of the Hospital. The parties again discussed the availability of ancillary staff information. Weisenbach reiterated that the Hospital would not provide information on nonunit personnel because the Union did not represent those employees, and further because, as to the number of one-to-one assignments, there was no way to gather the information. (Tr. 35, 3-10; Tr. 104, 12-14).

The Union also questioned the adequacy of "snapshots" of nurses on duty at the start of each shift at 8 a.m. and 8 p.m. to satisfy its information requests, which the Hospital was willing to provide. (Tr. 101, Ex. 13). The Union, apparently concerned that shift-start data for nurses

may not reflect mid-shift data, suggested that snapshots at different time frames would be helpful and requested up-to-date data. Weisenbach agreed to provide this information. (Tr. 101, 16-23). After the meeting, Weisenbach obtained staffing data using 10:00 a.m. and midnight as the "snapshot" for measuring staffing levels on each shift. (Tr. 105).

F. The Union's April 12, 2013 Information Request and the Hospital's Response

On April 12, 2012, the Union made its third letter request, seeking the "maximum patient census on each unit for each shift during the period of September 1, 2012 – April 12, 2013 (present date)." (Ex. 15). Because Weisenbach had gone out on maternity leave only a few days prior, Banerjee emailed the request to Kiera Stajk, a Hospital employee who assumed Weisenbach's duties from April 9, 2013 to late August 2013. (Ex. 14-15; Tr. 42-43; 120).

As noted above, Weisenbach previously had extracted additional unit staffing data for the Union. When she left on leave, Weisenbach emailed this data to Stajk as a Microsoft Excel file. (Tr. 102, 4-8). Stajk believed that the information Weisenbach gave her was responsive to the Union's information request. Rather than provide the Union with the entire Excel file, Stajk printed the first page, a summary tab, and scanned it. (Ex. 17; Tr. 102, 8-11). Subsequently, Stajk emailed the page to Banerjee. (Ex. 17). Weisenbach thought the Union had received the entire staffing data file, and the Union never informed her differently. (Tr. 124, 6-12). Weisenbach was unaware until recently that the Union had not actually received all staffing data. (Tr. 102, 13-14). Once she learned what Stajk had provided, Weisenbach provided the entire data file. (Tr. 102; Tr. 124, 21-23). The Hospital did not refuse to provide the data, or otherwise act in bad faith. (Tr. 100, 2-4; Tr. 102, 12-19; Tr. 106, 18-24).

The General Counsel introduced no evidence of any Union actions over the past year to follow-up on any information requests that it deemed inadequate. Rather, as explained by

Weisenbach, the Union led the Hospital to believe that the information provided was sufficient, and that certain other information was not necessary.

ARGUMENT

POINT I

THE ALJ ERRED IN CONCLUDING THAT THE UNION HAD NOT WAIVED ITS RIGHT TO THE REQUESTED INFORMATION AS THE REQUESTS AROSE IN CONNECTION WITH A STAFFING RATIO GRIEVANCE.

A. The Union's Information Requests Sought Information that Did Not Affect the Nurse to Patient Staffing Ratios.

This is an information request case. However, the Hospital's waiver argument and its arguments against the relevancy of the requested information obtains meaning from the underlying grievance. That grievance is about nurse to patient staffing ratios. The Union's expressed need for the information requested, including information concerning nurses' aides, is that they purportedly "impacted the ratios." (Tr. 39, 41).

The ALJ agreed with the Union that the requested information, including that concerning nurses' aides, "impacted" nurse to patient staffing ratios. However, the ALJ's overarching error was failing to recognize the deficiency in this conclusion. As a matter of logic, the Union's argument makes no sense. Nurse to patient staffing ratios are an agreed-upon set of concrete numbers memorialized in the CBA. None of the information requested by the Union has any impact on whether those numbers have been met. Whether nurses' aides perform one-on-one shifts or are pulled off units to cover one-on-one assignments is completely irrelevant to the numerical calculation of whether the Hospital has provided for the CBA-required level of nurses on staff on each unit.

Questions about the type and amount of work performed by nurses' aides may be relevant to the larger question of whether the current nurse to patient staffing ratios are *appropriate*.

However, the Union's information requests did not arise within that context. Indeed, the parties already negotiated and agreed upon appropriate nurse staffing levels, as memorialized in the CBA. (Ex. 3 at 84). The Union has never sought to reopen negotiations in this respect. Rather, the Union made its information requests in connection with an Article XXVI staffing grievance. As set forth in the parties' CBA, such grievances are subject to a specific grievance procedure that does not require a review of any information other than, "actual staffing compared to required staffing … based on the average daily census." (Ex. 3 at 81).

B. The Union Waived its Right to Seek Additional Information in Connection with Staffing Grievances.

As the ALJ correctly found (Dec. at 10), a union may, by "clear and unmistakable" waiver, waive a statutory bargaining right, including its right to information. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *American Broadcasting Co.*, 290 NLRB 86 (1988). Under Board law, a waiver can occur in one of three ways: 1) by express provision in the CBA, 2) by the conduct of the parties (including past practices, bargaining history, and action or inaction), or 3) by a combination of the two. *United Technologies Corp.*, 274 NLRB 504 (1985), citing *Chesapeake & Potomac Tel. Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982).

The ALJ erred in failing to find that the contractual procedure for monitoring compliance with Article XXVI acts as a waiver of the Union's right to seek additional information in connection with an Article XXVI dispute. (Dec. 10). The Union's concern under Article XXVI is nurse to patient ratios. (Tr. 52, 9-16). The record in this proceeding clearly reflects that the Union's information demands have been made in furtherance of its Grievance under Article XXVI. (Tr. 50, 12-14). That procedure delegates for determination of whether there has been a violation of Article XXVI to a review, on a quarterly basis, of actual staffing compared to required staffing based on the average daily census. (Ex. 3 at 81). The parties' agreement to

limit the scope of producible information in an Article XXVI dispute is lawful, reasonable and practical. It is undisputed that whether the Hospital has substantially complied with Article XXVI can be readily ascertained through a review of the staffing data. The Union has therefore waived through the CBA any right to further or different information.

Here, only one of the Union's information requests sought information to which it is entitled, and even there the Union failed to make the request in connection with the quarterly review process. Although under no obligation to provide staffing data outside of the quarterly review process, the Hospital did so here, remaining willing to do so upon request as a courtesy to the Union. (Exs. 12-13, 17-18; Tr. 99, 16-18; Tr. 100, 2-4; Tr. 124, 21-23).[4]

The ALJ erred in distinguishing the Board's decision in *New York Post*, 353 NLRB 625 (2008). (Dec. at 10). The Board's decision in that case is persuasive as to the waiver issue here. The ALJ asserts that the parties' CBA does not contain "limiting language" like the memoranda of understanding (MOUs) at issue in *New York Post* to demonstrate the parties' intent of establishing a separate forum for resolving grievances. (Dec. 10-11). The ALJ is mistaken. In *New York Post*, 353 NLRB 625 (2008), the Board concluded that the establishment of a separate process for investigating complaints and enforcing terms meant that the union had waived its right to obtain certain information outside of that process. Similarly here, the parties established a separate procedure for monitoring staffing compliance that limits the information to be produced in connection with an Article XXVI staffing grievance. The Union's grievance indisputably arises under Article XXVI, which defines what information the Union may obtain.

The ALJ interpreted contractual language to support her finding that the Union did not waive its statutory right to information. (Dec. at 11). Specifically, the ALJ found that the fact

[4] It is not clear from the record whether the parties have been conducting formal quarterly reviews of staffing levels. If not, the Union can request such a meeting.

that the parties agreed to discuss "possible causes of and solutions to individual unit variances" is a demonstration that the Union had not agreed to limit its information requests. (Dec. at 11). That is a *non-sequitur*. Agreement on a discussion agenda is not dispositive of how contractual language should be construed. The ALJ also cited to Article XXVII of the CBA, wherein the parties agreed that "performance of non-nursing functions by registered nurses impedes their ability to deliver quality, cost-effective patient care," as language that "cannot be said to constitute clear and unequivocal evidence of the Union's waiver of its statutory right to seek information." (Dec. at 11). The ALJ confuses and conflates two unrelated CBA provisions. In so doing, the ALJ wrongly failed to recognize the special procedure regulating dispute resolution of the sort claimed in the underlying grievance. Certainly the Union is free to police the CBA. However, the Union through its labor contract agreed to waive any right to seek information in connection with an Article XXVI staffing grievance. The argument that non-nursing functions should not be part of a nurse's job, based on CBA Article XXVII, is not the underlying issue in this proceeding. That question has already been arbitrated between the parties. (Tr. 97-98).

The ALJ also erred in distinguishing the Board's decision in *American Broadcasting Co.*, 290 NLRB 86 (1988). There, the parties agreed upon a Non-Discrimination Article in their CBA that required the employers, all members of an association, to submit quarterly reports containing the sex and ethnicity of employed writers. The Article also provided for the establishment of a committee to analyze and review the submitted data and to expand the data required if necessary. Even though the union had agreed to the procedure and its limits on the kinds of information to be produced under the Article, it subsequently requested age and handicap data of *unit* employees. The Board ruled that the employers were not obligated to provide this information to the union because the parties already had agreed to limit its production under the Article. Thus,

the Non-Discrimination Article constituted a waiver of "whatever statutory right the Union might otherwise have to the information." *American Broadcasting Co.*, 290 NLRB at 88. And that case involved unit employees, not nonunit employees as in this case.

Here, the parties agreed to limit the *type* of information that must be produced in connection with an Article XXVI grievance. Just as in *American Broadcasting Co.*, the Union cannot file an Article XXVI grievance and then seek information outside the mandated process. Rather, the Union agreed that an Article XXVI grievance may be resolved by comparing actual to required staffing based on the average daily census. Therefore, the ALJ's attempt to distinguish *American Broadcasting* is misplaced.

The ALJ also failed to address the other cases cited by the Hospital in which the Board has found a waiver. Those decisions demonstrate that a Union will be found to have waived a statutory right to information when the parties have memorialized such a waiver in the CBA. *See Hughes Tool Co.*, 100 NLRB 208 (1952) (No duty to provide information on subcontracting where CBA granted employer excusive responsibility for subcontracting decisions); *Boston Mutual Life Ins. Co.*, 170 NLRB 1672 (1968) (No duty to provide information on discharged probationary employee where those employees were subject to dismissal at employer's discretion); *Int'l Shoe Co.*, 151 NLRB 693 (1965) (No duty to provide information on work relocation due to union's prior waiver).

Not only do the CBA's clear limitations demonstrate the Union's waiver, but the parties' bargaining history also supports the Hospital's argument that the Union waived its claim. The Union sought to revise the CBA to regulate the number of nonunit personnel. The Hospital rejected that effort at the bargaining table. The Union's abandonment of this CBA modification upon the Hospital's opposition constitutes the Union's acknowledgment that it does not have the

contractual right it now claims. The Union should not be permitted to change its bargained-for agreement through Board litigation. *See Hearst Corp.*, 113 NLRB 1067 (1955) (no duty to provide information where information request was similar to bargaining proposals for information that had been abandoned by union).

In sum, the Union and the Hospital agreed to resolve Article XXVI disputes in a specific way that limits the information to be produced. The only information to which the Union is entitled through that contractually mandated process is unit staffing data based on the average daily census.

POINT II

THE ALJ INCORRECTLY FOUND THAT THE INFORMATION SOUGHT BY THE UNION WAS RELEVANT.

A. Legal Standard in Information Request Cases

It is well-settled that an employer has the obligation to provide, upon request, relevant information that a union needs for the proper performance of its duties as a collective-bargaining representative. *See Disneyland Park*, 350 NLRB 1256 (2007); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). This duty includes information relevant to a union's decision to file or process grievances. *See, e.g., Beth Abraham Health Services*, 332 NLRB 1234 (2000).

Information pertaining to bargaining unit employees is presumptively relevant and an employer typically must provide the requested information. However, where a union makes a request for information concerning matters outside of the bargaining unit, including information pertaining to nonunit employees, the union has the burden to demonstrate that the information it seeks is relevant to its representation duties. *National Broadcasting Co.*, 352 NLRB 90, 97 (2008). To meet this burden, the Union must demonstrate a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, 350 NLRB at

1257-58. To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated the relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the employer under the circumstances. *Id.*; *see also Detroit Edison Co. v. NLRB*, 440 U.S. at 313 ("A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all of the information in the manner requested"). The union must explain relevance to the employer with some precision beyond the mere conclusion of an "impact" on the nurses (Point I at 11, *supra*). Such a generalized, conclusory explanation does not trigger an obligation to supply information. *Disneyland Park*, 350 NLRB at 1258 n.5; *Island Creek Coal*, 292 NLRB 480, 490 n.19 (1989).

B. <u>The Union is not Entitled to Nonunit Employee Information</u>

The ALJ found that information sought concerning nurses' aides was relevant because, when the nurses' aides are not on duty or otherwise assigned, their responsibilities are assumed by registered nurses, which erodes the level of patient care that the contractually-prescribed ratios are designed to ensure. (Dec. at 12-13). Yet the record contains no facts as evidence of the reality of any such concern. The Union's explanation of relevance was incoherent, its relevance never apparent to the Hospital "from the surrounding circumstances." *Disneyland Park*, 350 NLRB at 1258.

As explained above, information about nurses' aides does nothing to assist the Union in policing Article XXVI's nurse staffing levels. When the Hospital sought an explanation as to why nonunit information was needed, the Union could not respond. First, Banerjee was unable to articulate relevance during conversations with Weisenbach. (Tr. 103). Then, when the parties had a March 5 Grievance meeting, the Union vaguely observed that an increase in aide one-on-one patient observations was pulling aides away from doing other functions to the inconvenience of nurses. (Tr. 103). However, claims about aide assignments are meaningless here. Whether

the nurses' jobs become more burdensome due to nonunit staffing vagaries does not answer the *single* question relevant to the grievance and therefore to this proceeding, namely whether the Hospital has complied with the *nurse* staffing levels agreed upon by the parties, particularly in the absence of further negotiations.

Hence, the Union's vague references to the potential impact upon the work level of nurses, which inexplicably affects nurse-to-patient ratios, does not satisfy its duty to justify with precision the relevance of presumptively non-relevant information. As one court has explained, "[w]hen [a] union asks for information which is not presumptively relevant, the showing by the union must be more than a mere concoction of some general theory which explains how the information would be useful to the union in determining if the employer has committed some unknown contract violation." *See San Diego Newspaper Guild, Local No. 95 of Newspaper Guild, AFL-CIO, CLC v. NLRB*, 548 F.2d 863, 868 (9th Cir. 1977). What the Union has sought here as to ancillary staff has no connection to its underlying grievance. Its only possible use would be to further future collective bargaining negotiations over nurse-to-patient staffing levels. Yet the Union did not claim that its requests were made for this purpose, and no such negotiations have been sought or are pending. Accordingly, given the precision with which nonunit information requests must be made, the ALJ erred in supposing the relevance of information requests concerning nurses' aides. *See Schrock Cabinet Co.*, 339 NLRB 182 n. 6 (2003). Particularly where a union's request concerns nonunit employees, the union must offer "more than a mere suspicion" for it to be entitled to the requested information. *Honda of Hayward*, 314 NLRB 443 (1994); *Sheraton Hartford Hotel*, 289 NLRB 463 (1985).

1. The Contractual Reference to Qualified Support Personnel Does not Demonstrate Relevance

The ALJ found that the relevance of the nonunit employee information should have been apparent to the Hospital, in part because Article XXVI states that the Hospital shall provide "qualified support personnel on duty in order to meet the nursing care needs of patients." (Dec. at 12). The ALJ erred here by not considering the recent bargaining history between the parties. As Weisenbach explained, the Union sought to obtain guarantees concerning nonunit staffing levels in the most recent CBA negotiations in 2012. The Hospital opposed any such suggestion because the Hospital has the right to schedule its nonunit workforce and, in any event, it did not believe that the Union's requests were relevant to Article XXVI. (Tr. 97-98).

Ultimately, the Hospital agreed to provide *qualified* support personnel on duty. Aide staffing information has nothing to do with their qualifications. By agreement through the CBA, individual qualification is all the Union is entitled to explore as to aides. No connection exists between the Union's various information requests about nurses' aides and the single contractual requirement to provide qualified support personnel. More than a mere citation to the CBA is required. The Union must demonstrate a connection between the information sought and the CBA provision cited. As the Board has stated:

> In order to show the relevance of an information request, a union must do more than cite a provision of the collective-bargaining agreement. It must demonstrate that the contract provision is related to the matter about which information is sought, and that the matter is within the union's responsibilities as the collective-bargaining representative.

Disneyland Park, 350 NLRB at 1258. Here, the Union sought scheduling information as to employees it does not represent, including overtime hours worked. As earlier pointed out, such information has nothing to do with the Union's pending Article XXVI Grievance.

2. The Union's After-the-Fact Explanations of Relevance are Insufficient

At the hearing, the Union attempted belatedly but unsuccessfully to provide an explanation for the relevancy of the information requests about nurses' aides. Although the Union asserts that it gave these explanations at the March 5 and March 14 meetings to justify nurse to patient ratios concerns, it did not. (Tr. 108, 22-25; Tr. 109, 1-9). Once at hearing, the Union came up with a number of different reasons, all of which reduce to the charge that an increase in "constant observations" was pulling aides away from doing other aides functions, thus forcing nurses to do aides work. (Tr. 108, 8-15; *see also* Tr. 35, 23-25; Tr. 36, 1-2; Tr. 57). Yet, these reasons have nothing to do with nurse staffing ratios. (Tr. 108, 22-25; Tr. 109, 6-9).

Regardless of whether nurses perform work the Union thinks more appropriately should be done by other employees, the nurse to patient ratios are a product of negotiation and review through Article XXVI, dealing with establishment and maintenance of appropriate ratios. (Ex. 3, page 81, *et seq.*; Tr. 13, 3-5, 12-14). Debate as to what aides do or not do, or the time they spend at whatever they do, or the extent to which nurses may feel compelled to do the work of aides—all of which the Union now contends is relevant to determining proper ratios—necessarily is subsumed by the contractual process as outlined in the CBA. With all the Union's potpourri of reasons, it has never answered the fundamental question as to how nonunit information would enable different determinations of nurse to patient ratios. Union Executive Director Toback could not answer the fundamental question:

> Judge Landow: How does that, knowing that affect your assessment of nurse to patient ratio, RN to patient ratios?
>
> The Witness: We have to determine if nurses are, in fact, doing the job they are supposed to be doing or if they are doing that plus other people's jobs.

(Tr. 64,18-22).

Obviously, the Union Executive Director recited a disconnect. The determination of what nurses do could be made simply by observation. On the other hand, knowledge of the hours worked by aides, or how many there are, or their overtime hours, cannot possibly help to determine whether the CBA's nurse to patient ratios have been met. The Union has never made that connection in this case. As Weisenbach testified, what work ancillary staff may or may not do has no bearing on nurse to patient ratios:

> Q Why did the hospital think that quantities of nurse's aides or ancillary staff did not relate to patient care ratios?
>
> A The RNs have specific ratios and they also have language that permits them to do nursing functions, and actually, more appropriately, tells them what they can't do or enumerates that they don't do non-nursing functions. So what an ancillary employee may or may not do really has no bearing on the ratios of patients to nurses.

(Tr. 99, 4-11). Therefore, the information the Union has demanded about nurses' aides cannot pass the relevancy test.

In sum, the ALJ erred in not recognizing that information about the staffing of nurses' aides has no impact on the nurse-to-patient ratios at issue here.

C. The ALJ Erred in Finding that the Hospital Refused to Provide Information Regarding the Bargaining Unit or Unlawfully Delayed in Providing Such Information.

Three of the information requests concern unit employees: 1) the February 27 patient/RN staffing information request, 2) the FTE full complement standard for unit employees, and 3) the April 12 request for the maximum patient census. As set forth above, the Union has waived its right to information except for that pertaining to patient/RN staffing. Irrespective of this waiver, the Hospital did not refuse to provide any unit employee information.

First, in connection with the staffing data request, it is undisputed that the Hospital provided responsive information. (Exs. 12-13). The Hospital inadvertently did not produce data

for the entire time period requested. However, the Union never complained that the response was incomplete or otherwise sought additional information. Under such circumstances, where the failure to produce a complete response is inadvertent and the Union never seeks additional information, there can be no violation of the Act.

The ALJ erred in determining that the Hospital did not provide a legitimate excuse for not providing this information in complete form in a timely manner. Specifically, however, the Hospital explained its inadvertent failure (Tr. 100-02), as well as the Union failure to assert its right to information in any follow-up communications. Thus, the Hospital believed, in good faith, that information that it had provided was satisfactory. Under such circumstances, the Board will find that no violation of the Act has occurred. *See Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 635 (2010), enfd. 638 F.3d 883 (8th Cir. 2011) (No violation of the Act where the employer provided information it believed to be responsive to a request and the Union "did not subsequently renew its information request or otherwise indicate that it expected more information."); *Day Automotive Group*, 348 NLRB 1257, 1262 (2006) (No violation of the Act where the employer made a good faith effort to provide the Union with relevant information); *United States Postal Service*, 360 NLRB No. 94 (Apr. 30, 2014) (No violation of the Act where delay in furnishing information due to union's delay in following up on relevance); *NLRB v. Movie Star, Inc.*, 361 F.2d 346, 350 (5th Cir. 1966) (no violation of the Act where "failure to furnish the records was not the result of bad faith but was due to a breakdown in negotiations").

Second, the Hospital provided documentation that it believed was fully responsive to the Union's April 12, 2013, information request. (Ex. 15). As detailed above, due to technical issues and miscommunications caused by Weisenbach's unavailability for personal medical

reasons, a single page of data was provided. As with the prior request, the Union never sought additional information, even though it was aware that the prior response to a similar request had consisted of several pages. (*Compare* Ex. 7 with Exs. 12, 13). As soon as Weisenbach learned that the Union had not received all of the staffing data, she provided the information to the Union. (Exs. 18-19). Manifestly, the Hospital has not refused to provide information in response to this request.

Third, the Hospital did not refuse to provide the FTE full complement standard for bargaining unit employees. Rather, at the March 5 Grievance hearing, the Hospital explained that although it would not provide data on nonunit employees it would be willing to provide unit employee data. However, the Hospital also pointed out that the Union routinely receives a full listing of unit employees and could request that data at any time. Therefore, the Hospital reasonably believed that the Union was already in possession of information sufficient to satisfy this part of the request. (Tr. 106). It also reasonably expected the Union to follow up if that information actually was needed. Since the Union did not do so, the ALJ erred in finding the Hospital's failure a violation of the Act.

D. <u>The Hospital Explained to the Union that it did not have Certain Information</u>

The Hospital explained to the Union that it was not in possession of documents responsive to certain requests or that the information would be unreasonably difficult to compile. For example, Weisenbach explained to Banerjee that data on one-to-one assignments was not tracked by the Hospital as an electronic medical record. Regardless of whether the Union was entitled to the information, it was not retrievable from files maintained by the Hospital. (Tr. 104). Likewise, the Hospital explained to the Union that it did not track "mean and mode" hours between the time when patients were discharged and when they actually left the Hospital. In other words, the Hospital did not possess the information requested. Weisenbach explained to

the Union that the only way of obtaining such information would have been to search through "hundreds and hundreds" of patient records for the gap between discharge and exit. (Tr. 118). After the parties discussed this issue, Banarjee was satisfied, and therefore there was no need for production. (Id.).

The ALJ apparently did not credit Weisenbach's testimony on these points, even though there was no challenge to her testimony and even though the Union's primary contact for the grievance, Nisha Banerjee, was not called to testify by the General Counsel. The ALJ erred in not crediting Weisenbach's unchallenged testimony. Banerjee's failure to testify should result in an adverse inference under the Board's "missing witness" rule. *See Martin Luther King, Sr., Nursing Center,* 231 NLRB 15, 15, n.1 (1977). In *Martin Luther King,* the Board explained that where "relevant evidence which would properly be part of a case is within the control of a party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him." *Id.* at n.1. This rule may be properly invoked against the General Counsel. *See Stabilus, Inc.,* 355 NLRB 836, 840, n.19 (2010) ("failure to call a potentially corroborative witness may be considered in determining whether the General Counsel has established a violation by a preponderance of the evidence"). As a consequence it must be inferred here that Banerjee's testimony, were it elicited, would have corroborated Weisenbach's belief that she did not need to produce information unavailable or unduly burdensome to compile.

Information about reported discharge and actual discharge times of patients cannot be relevant as it does not affect nurse-to-patient ratios. Again, this may be an appropriate concern in 2015, when the parties bargain for a new CBA with new staffing levels, but none of it is relevant to the question of whether the Hospital is in compliance with current staffing levels.

Additionally, the Hospital explained to the Union that the Hospital did not maintain the information requested in the form requested, an explanation with which the Union appeared satisfied. Under such circumstances, the ALJ erred in finding a violation of the Act.

On this issue, the facts of this case are similar to that of *Vanguard Fire & Security Systems*, 345 NLRB 1016 (2005). There, the union requested, among other information, a list of hired employees that also showed their race, national origin, sex, sexual preference, age, disability, and religion. In response, the employer advised the union that it did not track the sexual orientation, religion, or disabilities of its employees, and therefore did not have the information. The union responded that it might not need that production. Accordingly, the employer reasonably believed that it would not be necessary to take further action to obtain the information through a burdensome investigation. *Id.* at 1045. Similarly, here, the Hospital did not maintain the patient discharge information sought by the Union. Certainly, the employer in *Vanguard* could have surveyed its employees to determine their sexual orientation or religion, but such an onerous task was deemed unnecessary when the Union did not press for the information. Likewise, here, the Hospital would have had to compile discharge information for hundreds of patients through onerous and time-consuming analysis of patient records, but there was no reason to do so after the Union was satisfied with the Hospital's explanation. Contrary to the ALJ's Order (Dec. at 16), no basis exists to require the Hospital to bargain with the Union over the manner for the provision of such information, and the time frame for doing so, particularly when the Union had previously conceded that it did not really need the information.

POINT III

THE ALJ ERRED IN NOT DEFERRING THE CASE TO ARBITRATION.

The ALJ found that this information request dispute should not be deferred to arbitration because the Board has long held that deferral is inappropriate in Section 8(a)(5) cases. (Dec. 10). Nonetheless, the particular circumstances of this case make it uniquely suitable for deferral to arbitration. The CBA contains specific language concerning the obligation to furnish information in connection with Article XXVI. (Ex. 3 at 81). Since the Hospital's primary defense is that the Union has waived its right to request the information, an arbitrator can look to Article XXVI to resolve the dispute precisely because the waiver is on account of the parties' labor contract. *United Aircraft*, 204 NLRB 879 (1973), aff'd sub nom. *Machinists Lodges 700, 743, 1746 v. NLRB*, 525 F.3d 237 (2d Cir. 1975); *see also New Island Hospital*, 344 NLRB 198, 199 (2005) (Explaining that deferral may be appropriate in an information request case where a provision in the CBA deals with requests for information). Thus, the dispute is well suited to resolution by arbitration because the central issue in this dispute is contract interpretation.

The ALJ did not address any other factors typically considered by the Board in determining whether deferral is appropriate. However, those factors, including the existence of a long collective bargaining relationship, all favor the Hospital. The underlying grievance is pending, and the parties have previously arbitrated nurse work assignments in connection with Article XXVII concerning non-nursing functions. (Tr. 50-51; 97-98). The fact that both the Company and the Union continue to file and process grievances demonstrates "full acceptance by both parties of the grievance and arbitration route to the resolution of disputes and demonstrates the existence of a workable and freely resorted to grievance procedure." *United*

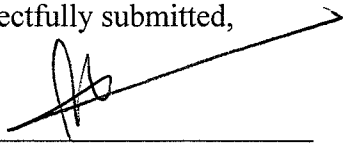
Technologies, 268 NLRB 557, 560 n.21 (1984). The Hospital has indicated its willingness to waive any timeliness defense. For all these reasons, the dispute should be deferred to arbitration.

CONCLUSION

The ALJ's decision incorrectly found that the Hospital had failed to provide information to the Union. The Board should dismiss the ALJ's Order in its entirety. Alternatively, the Board should defer the information requests to arbitration.

November 26, 2014
New York, New York

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that Lenox Hill Hospital's Memorandum of Law in Support of Exceptions to the Administrative Law Judge's Decision was duly served upon the following individuals by electronic transmittal on November 26, 2014:

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